NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-286

	Opinion Delivered November 5, 2008
DENNIS SCHLEIFER APPELLANT	APPEAL FROM THE MONTGOMERY COUNTY CIRCUIT COURT, [NO. CR-2006-53]
V.	HONORABLE WILLIAM MCKIMM, SPECIAL JUDGE
KENNY SELLS and KENNY SELLS FAMILY TRUST APPELLEES	AFFIRMED

EUGENE HUNT, Judge

This appeal arises from an order denying rescission of a contract for the sale of real property. The appellant, Dennis Schleifer, sought rescission of the contract based upon an alleged misrepresentation, which involved the failure of the vendor to disclose the existence of several graves located on the property. The trial court found that there had been constructive misrepresentation but that it was not sufficiently material to warrant rescission under the facts of this case. We find no error in the trial court's ruling; thus, we affirm.

Background

On February 18, 2006, appellant and Kenny Sells, as trustee of the Kenny Sells Family Trust, executed a real estate contract for approximately 105 acres of property

located at 1383 Polk Creek Road in Norman, Arkansas. The property included a house, which appellant planned to reside in as a retirement home. Under the contract, Schleifer was to purchase the property for $450,000.

Appellee completed a "Seller Property Disclosure" form dated February 15, 2006. There is no mention of any grave sites located on the property on the disclosure form, and it was undisputed that appellant had no knowledge of their existence until after the closing. Appellee testified that he did not disclose that the property contained grave sites because there was no question specifically addressing grave sites or cemeteries. Appellant argued that the existence of the graves should have been disclosed to him under some of the more general questions. Question 34 asked whether there were any "facts, circumstances or events" on the property that could adversely affect its value or desirability to a potential buyer. Question 41 asked whether there were "any other defects" in the property known to the seller. Appellee answered "no" to both.

The disclosure form makes clear that the buyer (appellant) had the duty to inspect the property prior to purchase and that the disclosure form is not a substitute for inspections. Testimony revealed that appellant had the opportunity to inspect the property several times prior to closing, and besides inspecting the house and the area immediately surrounding it, appellant chose only to drive the roads on the north and east sides of the property and to walk around one of the ponds. The sale closed, and appellant took possession of the property.

There are five grave sites located together in a small wooded area on less than a quarter of an acre of the 105-acre property in question. They are close to the county road and are marked by headstones. Testimony at trial was conflicting as to whether they were actually visible from the road. According to the testimony of the two realtors involved in this transaction, such small grave sites are a common occurrence in their area of rural Arkansas. Neither realtor believed the existence of the grave sites would affect the value of the property, although one did state that the grave sites could limit the pool of potential buyers. At trial, the property was valued at $525,000; this was a $75,000 increase in value since appellant's purchase.

Appellant first discovered the grave sites approximately three weeks to a month after closing. According to the testimony of the two realtors, appellant at first did not think the grave sites were a negative. His attitude changed after his ex-wife would not come visit him because of the graves. Appellant testified that he had some people come from Hot Springs and request permission to visit the graves, which he granted. He later noticed that the headstones had been propped up, and he reported the trespassing to the sheriff.

Appellant filed his complaint on October 23, 2006. Following a bench trial, the court entered its order on November 9, 2007. The trial court found that there was no fraudulent intent on the part of the defendant-appellee. However, the trial court also found that appellee had a duty to disclose the existence of the grave sites to appellant and did not do so. The court further held that rescission was not the proper remedy for this

constructive misrepresentation because the existence of the grave sites was not material. The court based its finding on (1) the strict remedy elected by appellant and (2) the fact that appellant had suffered no damages because the fair market value of the property had increased since appellant's purchase.

Since the trial court's finding that appellee's non-disclosure of the existence of the grave sites constituted "constructive misrepresentation" is not contested, all that is at issue in this appeal is whether that finding constituted grounds for rescinding the contract. Put another way, the issue is whether rescission was the appropriate remedy for appellee's constructive misrepresentation. The trial court found that rescission was not warranted because the existence of the grave sites was not sufficiently material to the contract. We find no error in the trial court's ruling.

Standard of Review

The standard of review in equity cases is de novo,[1] but the trial court's findings of fact will not be reversed unless they are clearly erroneous. *England v. Eaton*, 102 Ark. App. 154, __ S.W.3d __ (2008). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* Whether a misrepresentation is material, making the remedy of complete rescission available, is a question of fact. *See Ellis v. Liter*, 311 Ark. 35, 841 S.W.2d 155 (1992); *Baugh v. Johnson*, 6 Ark. App. 308, 317, 641 S.W.2d 730, 735 (1982).

Discussion

[1] Rescission is a remedy cognizable in equity. *See Hudson v. Hilo*, 88 Ark. App. 317, 320, 198 S.W.3d 569, 572 (2004).

On appeal, Schleifer argues that it was error for the trial court to refuse to order rescission of the contract. He contends that rescission is a proper remedy because (1) he would not have bought the property had he known about the graves; (2) he cannot use the property as he wants because his ex-wife, who is of Asian descent, refuses to come on the property;[2] (3) the property is subject to being visited by strangers at any and all times to view the graves; and (4) due to statute, he cannot disturb the graves in any manner in order to cure the problem. He further contends that if he did not receive that which he thought he was receiving, i.e., lands with which he could do as he pleased and enjoy in their entirety without interference from third parties, then he is entitled to a restoration of the status quo, in this case, rescission. None of these arguments are persuasive.

Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others; neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003). Constructive fraud may be a sufficient basis for rescission of a contract. *See Cardiac Thoracic and Vascular Surgery, P.A. Profit-Sharing Trust v. Bond*, 310 Ark. 798, 840 S.W.2d 188 (1992). However, a plaintiff must show a *material* misrepresentation of fact for rescission to be an appropriate remedy. In *Ballard v. Carroll*, 2 Ark. App. 283, 621 S.W.2d 484 (1981), this court set forth the following four-part test to determine whether the

[2]This argument is directly contrary to appellant's own testimony. At trial, appellant testified that his wife never refused to come on the property because of the grave sites and that she had simply stated "Asian people don't like cemeteries."

rescission of a contract upon the ground of fraudulent representations could be maintained:

> (a) Was the fraud material to the contract; did it relate to some matter of inducement to the making of the contract?
>
> (b) Did it work an injury?
>
> (c) Was the relative position of the parties such, and their means of information such, that the one must necessarily be presumed to contract upon the faith reposed in the statements of the other?
>
> (d) Did the injured party rely upon the fraudulent statements of the other, and did he have a right to rely upon them?

Id. at 286-87, 621 S.W.2d at 486. Here, the trial court examined these four inquiries, and it found that appellant had not proved materiality or damages.

We believe the case of *Baugh v. Johnson*, 6 Ark. App. 308, 641 S.W.2d 730 (1982), is instructive regarding the considerations involved in determining materiality. In *Baugh*, this court discussed whether rescission was appropriate in a real estate transaction. This court quoted from *Yeates v. Pryor*, 11 Ark. 58 (1850), as follows:

> There can be no doubt that the defect in the quantity sold may be of such a nature, or of such an extent, as to entitle the vendee to a rescission [sic] of the contract. On the other hand, it may be so small, or of such a nature as to afford no solid objection to the specific execution of the contract. It is difficult to lay down any general rule upon the subject; each case must, of necessity, depend on its own peculiar circumstances. [There] are cases where specific performance was, under various circumstances, decreed, although it appeared that the vendee could not get the benefit of his whole contract. The court, in these cases, seems to have been mainly influenced by the consideration that the deficit was so small or unimportant as not very materially to affect the interest of the parties.

Baugh at 317, 641 S.W.2d at 735 (citations omitted). After having several opportunities to make inspections, appellant purchased 105 acres of rural property without knowledge of

the five grave sites that occupy a small portion of that property. Such grave sites are not uncommon in this part of the state, and the property has increased in value since his purchase. Under these facts, we cannot say that the trial court's findings are clearly erroneous.

Affirmed.

PITTMAN, C.J., and BAKER, J., agree.